

RESTRAINING JUDICIAL POWER: THE FRAGMENTED SYSTEM OF JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION IN AFGHANISTAN

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The 2004 Constitution of Afghanistan vaguely describes the powers of the Supreme Court (the Court) to interpret the constitution and exercise judicial review. It also describes an independent commission for the supervision of the implementation of the constitution (the Commission), whose powers are ambiguous and seem to overlap with those of the Court. The political branches of the government have taken advantage of these constitutional ambiguities and adopted legislation that vested judicial review and constitutional interpretation powers in two rival institutions, the Court and the Commission, thereby containing the power of the regular judiciary. This Article explores the implications of this fragmented system of judicial review in Afghanistan. It argues that this fractured system of judicial review has severely undermined the powers of the Court, and it has impeded the ability of both the Court and the Commission to issue binding judicial review opinions. Both entities have instead developed a practice of advising the political branches of the government, and, in the process, they have issued a large number of advisory opinions, letting the executive and the legislature treat the Court and the Commission as consultative bodies rather than co-equal and independent branches of the government.

This Article offers the first detailed examination of Afghanistan's judicial review system. In addition, it adds a critical and timely case study to the scholarship on the politics of courts in authoritarian regimes. Specifically, this history and analysis provide evidence to support claims made by Tom Ginsburg and Tamir Moustafa that authoritarian presidents try to restrain the power and authority of the regular judiciary by setting up competing institutions with overlapping jurisdiction over constitutional matters instead of creating a unified hierarchical institutional mechanism. This Article further illustrates that Ginsburg and Moustafa's theory might be extended to powerful, not necessarily authoritarian, executives who may also contain the power of the regular

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judiciary by intentionally engineering competing institutions to resolve constitutional disputes.

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I. INTRODUCTION

During the drafting of the 2004 Constitution of Afghanistan, the drafters extensively debated which institution, the Supreme Court (the Court) or a constitutional court, should exercise judicial review and interpret the constitution.¹ At first, the makers of the 2004 Constitution proposed a separate and independent constitutional court with explicit powers to interpret the constitution and review the constitutionality of legislation.² Later, however, the makers of the Constitution dropped the proposed constitutional court when former President *Hamid Karzai* (2002–2014) opposed it.³ The removal of the constitutional court raised a question over which institution had the power to issue binding constitutional interpretation and judicial review opinions.⁴ It was particularly confusing given other haphazard changes made in the draft, including Article 121, which empowered the Court to review the constitutionality of legislation, and Article 157, which required the establishment of the Independent Commission for the Supervision of the Constitution.⁵ As a result, neither the Commission nor the Court had clear authority to interpret the constitution and perform the various types of judicial review functions.⁶ Instead, both the Commission and the Court ostensibly share the authority to interpret the constitution and review the constitutionality of legislation.⁷

1. Shamshad Pasarlay, *Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?*, I-CONNECT (Mar. 18, 2015), <http://www.iconnectblog.com/2015/03/constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis/> [hereinafter *Constitutional Interpretation*].

2. *Id.*; see also JOHN DEMPSEY & J. ALEXANDER THIER, U.S. INST. OF PEACE, *RESOLVING THE CRISIS OVER CONSTITUTIONAL INTERPRETATION IN AFGHANISTAN* 1 (2009), <https://www.usip.org/publications/2009/03/resolving-crisis-over-constitutional-interpretation-afghanistan>.

3. See DEMPSEY & THIER, *supra* note 2, at 1–2.

4. *Id.* at 2; see also *Constitutional Interpretation*, *supra* note 1.

5. QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1382 (Jan. 3, 2004), arts. 121, 157 (Afg.), http://moj.gov.af/Content/files/OfficialGazette/0801/OG_0818.pdf [hereinafter 2004 CONSTITUTION OF AFGHANISTAN].

6. See *id.*

7. See MOHAMMAD HASHIM KAMALI, AFG. RESEARCH & EVALUATION UNIT, *AFGHANISTAN'S CONSTITUTION TEN YEARS ON: WHAT ARE THE ISSUES?* 5–6 (2014); see also *Constitutional Interpretation*, *supra* note 1.

This article explores the implications of the fragmented system of judicial review and constitutional interpretation in Afghanistan. It argues that when formed, the Commission was highly controversial largely because its powers were unclear and appeared to overlap with the powers of the Court, a body that, for the first time in Afghanistan's history, had been given the right to exercise judicial review.⁸ Over time, however, the Commission seems to have acquired significant interpretive and review authority through a practice of advising coupled with executive and legislative respect – or at least a lack of disrespect – for its opinions. Nevertheless, the Commission's practice of issuing advisory judicial review opinions in Afghanistan undermines the authorities of the regular judiciary because both the Court and the Commission can interpret the constitution and perform different types of judicial review functions. This fractured judicial review system further impeded the ability of the Court and the Commission to issue binding judicial review opinions. Both entities have instead developed a practice of advising the political branches of government, and, in the process, they have issued a large number of advisory opinions, letting the executive and the legislature treat the Court and the Commission as consultative bodies rather than co-equal and independent branches of the government.⁹

The rest of this Article is structured as follows. Part II provides a history of the debates about which institution should issue binding judicial review opinions during the 2002–2004 constitution-making process. It also describes how the political branches – the executive and the legislature – ended up structuring the current system of judicial review and constitutional interpretation. Part III charts how a crisis over constitutional interpretation emerged in the aftermath of then Foreign Minister Rangin Dadfar Spanta's case in 2007 and how the crisis intensified during the contested 2010 parliamentary elections. Part IV explores the powers of the Court and the Commission when it comes to issuing judicial review and constitutional interpretation opinions, revealing that both the Court and the Commission appear to share the power to interpret the constitution, review the constitutionality of legislation, and offer legal advice to the political branches of the government. Part V explores the broader lessons we might draw from the

8. *Constitutional Interpretation*, *supra* note 1.

9. *See* KAMALI, *supra* note 7, at 5.

fragmented system of judicial review in Afghanistan. Finally, part VI highlights that the competitiveness between the Court and the Commission to exercise judicial review and interpret the constitution might trigger a political crisis any time a dispute emerges between the political branches of the government, especially in highly politicized environments; part VI also addresses that constitutional designers should avoid setting up such institutional mechanisms. The appendices at the end of this Article provide translations of two important Court decisions that create an understanding regarding the Court's constitutional interpretation and judicial review powers.

II. THE 2002–2004 CONSTITUTION-MAKING PROCESS: QUESTIONS OF JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION

Following the removal of the Taliban regime in October 2001, the United Nations (UN) assembled in Bonn, Germany, leading Afghan elites to discuss plans for a future government in Afghanistan.¹⁰ The meeting in Germany resulted in the signing of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, otherwise known as the Bonn Agreement (the Agreement).¹¹ The Agreement arranged for a timetable for a two-year transitional period.¹² More specifically, the Agreement set an interim government followed by a transitional administration.¹³ The transitional administration was responsible for the drafting of a new constitution.¹⁴ The process for the making of the 2004 Constitution began in October 2002, when the then-president of the transitional government,

10. CHRIS JOHNSON ET AL., OVERSEAS DEV. INST., AFGHANISTAN'S POLITICAL AND CONSTITUTIONAL DEVELOPMENT 3 (2003), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5888.pdf>; see generally ZALMAY KHALILZAD, THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD (2016); see also JAMES F. DOBBINS, AFTER THE TALIBAN: NATION-BUILDING IN AFGHANISTAN (2008).

11. J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 566 (2006) [hereinafter *The Making of a Constitution*].

12. Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. DOC. S/2001/1154, at 3 (Dec. 5, 2001), <http://www.refworld.org/docid/3f48f4754.html> (art. I(4)).

13. *Id.* at 3 (arts. I(1), I(4)).

14. *Id.* (art. I(6)).

Karzai, appointed the Constitutional Drafting Commission (CDC).¹⁵ The process ended in January 2004, when Karzai signed and promulgated the new Constitution of Afghanistan.¹⁶

Afghanistan has a rich and long (although mostly failed) constitutional history, but the country does not have a long history of judicial review. From 1923, when Afghanistan adopted its first written constitution, up to 2004, Afghanistan has experienced nine different constitutions (including the two draft constitutions prepared by the *Sunni* and *Shi'ite mujahidin* parties in 1993).¹⁷ Except for the 1977 Constitution, which authorized the Supreme Court to interpret the constitution,¹⁸ none of the Afghan constitutions adopted judicial review or authorized the judiciary to interpret the constitution. While Afghanistan's 1987 Constitution created a French style constitutional council, that council only provided legal advice to the president of the state and performed *a priori* review of legislation, which also came in the form of legal advice to the president.¹⁹ The Council did not have the power to interpret the constitution or perform *a posteriori* review of legislation.²⁰

15. *The Making of a Constitution*, *supra* note 11, at 566; *see generally* Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, 15 J. DEMOCRACY 5 (2004).

16. Rubin, *supra* note 15, at 5; *see also* *The Making of a Constitution*, *supra* note 11.

17. *See generally* Amin Tarzi, *Islam and Constitutionalism in Afghanistan*, 5 J. PERSINATE STUD. 205, 210–41 (2012) (detailing the constitutional history of Afghanistan); *see also* Mohammad Hasan Kākar, *Constitutional History of Afghanistan*, ENCYCLOPEDIA IRANICA (Dec. 15, 1992), <http://www.iranicaonline.org/articles/constitutional-history-of-afghanistan>; *see also* Saïd Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 DRAKE L. REV. 943 (2005); *see also* NIGHAT MEHROZE CHISHTI, CONSTITUTIONAL DEVELOPMENT IN AFGHANISTAN (1998).

18. QANUN-I ASSASI-YE DAWLAT-I JAMHURI-YE AFGHANISTAN [CONSTITUTION OF THE REPUBLICAN STATE OF AFGHANISTAN] 1355 (1976), art. 135 (Afg.), http://moj.gov.af/Content/files/OfficialGazette/0301/OG_0360.pdf [hereinafter 1976 CONSTITUTION OF AFGHANISTAN] (this is cited as the 1977 Constitution based on the Lunar year 1355; however, based on the Gregorian Calendar, this Constitution came into being in 1976).

19. QANUN-I ASSASI-YE JAMHURI-YE AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN 1987] 1366 (1987), arts. 122–127 (Afg.), http://moj.gov.af/Content/files/OfficialGazette/0601/OG_0660.pdf [hereinafter 1987 CONSTITUTION OF AFGHANISTAN].

20. *See id.*

One of the key contested questions during the drafting of the 2004 Constitution was which entity – a separate constitutional court or the Court – to give the power to issue binding judicial review opinions.²¹ The drafting of the 2004 Constitution proceeded in five stages: stage I included the creation and work of the CDC, which prepared a first draft of the constitution.²² Stage II included the formation and the work of the Constitutional Review Commission (the CRC), which examined the draft prepared by the CDC.²³ In stage III, the government formed another, smaller committee comprised of the members of the CRC and members from the cabinet of the transitional administration, which revised the draft of the constitution prepared by the CRC.²⁴ In stage IV, the government convened the Constitutional *Loya Jirga* (the CLJ), Afghanistan's constitutional convention, which adopted the constitution.²⁵ Finally, stage V involved the promulgation of the constitution by Karzai in January 2004.

Initially, the CDC and the CRC both proposed a separate and independent constitutional court that had the power to review the constitutionality of legislation and interpret the constitution.²⁶ The Commission appeared in the 2004 Constitution at stage IV of the constitution-making process – during the debates at the CLJ.²⁷ Related to the changes in stage IV, the CLJ added Article 157 on the establishment of the Commission in the draft just hours before it adopted the constitution.²⁸

21. *Constitutional Interpretation*, *supra* note 1.

22. *See The Making of a Constitution*, *supra* note 11, at 566.

23. *Id.*

24. *Id.*

25. *Id.*

26. QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1382 (Mar. 2003), arts. 142–50 (Afg.) (draft prepared by the Constitutional Drafting Commission) (on file with author) [hereinafter DRAFT CONSTITUTION PREPARED BY THE CONSTITUTIONAL DRAFTING COMMISSION]; QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1382 (Nov. 2003), arts. 141–47 (Afg.) (draft prepared by the Constitutional Review Commission) (on file with author) [hereinafter DRAFT CONSTITUTION PREPARED BY THE CONSTITUTIONAL REVIEW COMMISSION].

27. KAMALI, *supra* note 7, at 13–14; *see also Constitutional Interpretation*, *supra* note 1.

28. QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1382 (Jan. 4, 2004), art. 157 (Afg.) (draft adopted by the

A. The Proposed Constitutional Court: Why Did the Government Remove It From the Draft?

The first draft of the 2004 Constitution prepared by the CDC included provisions defining a strong constitutional court.²⁹ The CDC members unanimously agreed to include a separate institution, the constitutional court, to interpret the constitution, conduct judicial review, and police constitutional compliance.³⁰ The CDC indicated that the inclusion of a separate constitutional court was necessary because, under previous Afghan constitutions, the political branches of the government consistently disregarded constitutional limits on their power.³¹ There were no strong institutions that could oversee the implementation of constitutions.³² Only a separate and powerful constitutional court could effectively serve the purpose of supervising the implementation of the constitution, interpreting the constitution, and performing all forms of constitutional review functions.³³ In the drafters' view, a constitutional court would also help prevent executive excesses of power and constrain that power.³⁴

Some members of the CDC emphasized that the world was moving toward constitutional courts and that almost all new democracies had successfully opted for separate constitutional courts to police constitutional compliance, resolve political disputes, and review the constitutionality of legislation.³⁵ Therefore, the CDC chose and included a separate constitutional court in the draft it prepared.³⁶ This view

Constitutional Loya Jirga) (on file with author) [hereinafter DRAFT CONSTITUTION ADOPTED BY THE CONSTITUTIONAL LOYA JIRGA].

29. DRAFT CONSTITUTION PREPARED BY THE CONSTITUTIONAL DRAFTING COMMISSION, *supra* note 26, arts. 142–50.

30. SARWAR DANISH, HUQUQ-I ASSAS-I AFGHANISTAN [CONSTITUTIONAL LAW OF AFGHANISTAN] 290 (1389) [2010].

31. *Id.*

32. Interview with Mohammad Amin Ahmady, Member, Constitutional Review Commission, in Kabul, Afg. (Apr. 9, 2015); Interview with Nematullah Shahrani, Chair, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afg. (Apr. 7, 2015).

33. Interview with Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afg. (Mar. 25, 2015).

34. *Id.*

35. *See* DANISH, *supra* note 30, at 290.

36. Interview with Mohammad Ashraf Rasooli, *supra* note 33.

confirms a recent but growing body of literature on theories of transnational diffusion, the idea that judicial review is adopted in response to previous adoption by other emerging democracies.³⁷

In this first stage of the 2002–2004 constitution-making process, the CDC designed a considerably stronger constitutional court. The following provisions of the CDC draft are related to the supreme constitutional court:

Draft Article 142. The Supreme Constitutional Court of the Islamic Republic of Afghanistan shall supervise and examine the conformity of laws with the constitution in accordance with the provisions of this Constitution.

Draft Article 143. The Supreme Constitutional Court shall be comprised of nine members appointed by the president for a period of six years. The president shall appoint one member as the head of the Court. The members of the Court can be reappointed. The presidents of the country shall be permanent members of the Court after their terms of service.

Draft Article 144. Members of the Supreme Constitutional Court shall have good character; higher legal and jurisprudential [*fiqhi*] education, ten-year experience in legislative, legal and judicial affairs, shall have completed forty years of age and shall not have been convicted for a crime and deprivation of civil rights.

Draft Article 145. The Supreme Constitutional Court shall have the following authorities:

1. Examine the conformity of laws, legislative decrees and international treaties with the Constitution;
2. Interpret the constitution, laws and legislative decrees;
3. Examine and resolve claims of fraud in the presidential elections;

37. See generally Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 588 (2013); see generally David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011); see generally Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399 (2011).

4. Offer legal advice to the president; and
5. Perform other functions bestowed on the Court by law.

Draft Article 146. The president or the government shall refer legislative bills to the Supreme Constitutional Court to examine their compliance with the Constitution.

Draft Article 147. In situations when a court, while adjudicating on a dispute, determines that the provision of a law on point in a dispute is in contradiction with the Constitution, the proceedings shall stop, and the issue shall be referred to the Supreme Constitutional Court. This provision shall also apply in cases when a party to the dispute claims such a contradiction and the court approves it.

Draft Article 148. The decisions of the Supreme Constitutional Court shall be final without review. Its decisions shall be published in the Official Gazette.

Draft Article 149. The property of the president, vice-president, prime minister, members of the government and justices of the Supreme Court shall be examined by the Supreme Constitutional Court before and after their terms of office.

Draft Article 150. Law shall regulate the structure and procedure of the Supreme Constitutional Court.³⁸

Ultimately, this CDC draft was submitted to the CRC for review and to the CLJ for approval. The CRC members also agreed to include an independent constitutional court in the constitution.³⁹ Debates on the constitutional court in the CRC centered around the number of judges at the constitutional court, the authorities of the constitutional court, and whether it should only be empowered to interpret the constitution, review the constitutionality of legislation, and offer legal advice to the president

38. DRAFT CONSTITUTION PREPARED BY THE CONSTITUTIONAL DRAFTING COMMISSION, *supra* note 26, arts. 142–50.

39. *See generally* ASHRAF RASOOLI, MOROR-I BAR QAWANEEN-I ASSASI-YE AFGHANISTAN [AN OVERVIEW OF THE CONSTITUTIONS OF AFGHANISTAN] (2nd ed. 1392 [2013]) [hereinafter AN OVERVIEW OF THE CONSTITUTIONS OF AFGHANISTAN].

or if it should also be authorized to examine executive actions for constitutional compliance.⁴⁰

Under the CDC draft, the constitutional court had the power to interpret the constitution, review the constitutionality of legislation, adjudicate on electoral disputes, and offer legal advice to the president.⁴¹ The CRC believed that the constitutional court would be overburdened if it performed all of these functions.⁴² Most argued that the constitutional court should only be empowered to review the constitutionality of legislation and interpret the constitution, laws, and international treaties.⁴³ Although the CRC did not explicitly list the review of executive actions for constitutional compliance as the authority of the constitutional court, it believed that constitutional review included the scrutiny of all executive and legislative actions for constitutional compliance.⁴⁴

Furthermore, the CRC rejected the proposal that the constitutional court should offer legal advice to the political branches of the government.⁴⁵ The CRC feared that the political branches of the government could misuse such advisory opinions and that issuing advisory opinions could also seriously undermine the independence and institutional security of the constitutional court and negatively affect the binding nature of its decisions.⁴⁶ In the end, the CRC members unanimously agreed to remove the constitutional court's power to issue advisory opinions from the CDC draft.⁴⁷ The final version of the constitutional court in the CRC draft that went to the government for approval looked like the following:

40. Deb. on Design of the Constitutional Court (2002–2004) (Afg.) (on file with author).

41. DRAFT CONSTITUTION PREPARED BY THE CONSTITUTIONAL DRAFTING COMMISSION, *supra* note 26, art. 145.

42. Deb. on Design of the Constitutional Court, *supra* note 40.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (remarks of Ashraf Rasooli and Abdul Hai Elahi).

47. DRAFT CONSTITUTION PREPARED BY THE CONSTITUTIONAL REVIEW COMMISSION, *supra* note 26, ch. 8.

Draft Article 141. The Supreme Constitutional Court of the Islamic Republic of Afghanistan shall supervise the conformity of laws with the Constitution.

Draft Article 142. The Supreme Constitutional Court shall be comprised of six members appointed by the president for a non-renewable period of nine years subject to the approval of the Upper House (*Mishrano Jirga*) of the National Assembly. The president shall appoint one member as the president of the Supreme Constitutional Court. Law shall regulate the structure and procedure of the Supreme Constitutional Court.

Draft Article 143. Members of the Supreme Constitutional Court shall be Afghan nationals not having other nationalities, shall have higher legal and jurisprudential [*fiqhi*] education, ten-year experience in legislative, legal and judicial affairs, shall have completed 40 years of age and shall not have been convicted for a crime and deprivation of civil rights.

Draft Article 144. The Supreme Constitutional Court shall have the following authorities:

1. Examine the conformity of laws, legislative decrees and international treaties with the Constitution; and
2. Interpret the Constitution, laws and legislative decrees.

Draft Article 145. The president, the government or one-fifth of the members of each house of the National Assembly can refer legislative bills to the Supreme Constitutional Court for a review of their compliance with the Constitution.

Draft Article 146. In situations when a court, while adjudicating a dispute, determines that the provisions of a law on point in a dispute is in contradiction with the Constitution, the proceedings shall stop, and the issue shall be referred to the Supreme Constitutional Court. This provision shall also apply in cases when a party to the dispute claims such a contradiction and the court approves it. The Independent Human Rights Commission can also refer laws to the Supreme Constitutional Court if it finds that a provision of a law violated the constitutional rights of the citizens.

Draft Article 147. Legislative documents that are declared unconstitutional by the Supreme Constitutional Court shall be considered ineffective. The decision of the Supreme Constitutional Court shall be final without review. Its decisions shall go into effect after publication in the Official Gazette.⁴⁸

Although some powers of the constitutional court, such as adjudicating on electoral disputes, were dropped, the constitutional court appeared unsatisfactory to the executive.⁴⁹ The executive feared that the constitutional court would become something like the Iranian Council of Guardians⁵⁰ that would use constitutional provisions, specifically those dealing with Islam and the *sharia*, to undermine the political system.⁵¹ Similarly, the then Iranian President Mohammad Khatami advised Karzai against the inclusion of the constitutional court in the Afghan Constitution, citing Iran's struggle with the Council of Guardians.⁵² However, a CRC member indicated that the CRC "had not designed the constitutional court carefully."⁵³ The constitutional court, as designed by the CRC, was a mixture of the American, French, and German models of constitutional court and constitutional review that turned out to be problematic in Afghanistan – a country which had never experienced constitutional review.⁵⁴ As such, the CRC was unable to defend the constitutional court, and the drafters opted to remove it from the CRC draft before the draft was submitted to the CLJ for approval.⁵⁵

48. *Id.* arts. 141–47.

49. *See generally* DEMPSEY & THIER, *supra* note 2.

50. The Iranian Council of Guardians has the responsibility under the Iranian Constitution to make sure laws passed by the legislature do not contradict the constitution and the standards of Islam. *Council of Guardians: Iranian Government*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Council-of-Guardians> (last visited Nov. 25, 2017).

51. *See Constitutional Interpretation*, *supra* note 1.

52. Interview with Mohammad Amin Ahmady, *supra* note 32; Interview with Mohammad Sediq Patman, Member, Constitutional Review Commission, in Kabul, Afg. (July 7, 2015).

53. Interview with Mohammad Alam Eshaqzai, Member, Constitutional Review Commission, in Nangarhar, Afg. (June 9, 2015); Interview with Mohammad Amin Ahmady, *supra* note 32.

54. Interview with Mohammad Amin Ahmady, *supra* note 32.

55. *Id.*

Karzai and his allies' opposition to the proposed constitutional court apparently related to Karzai's desire to limit checks on the executive power as much as possible. Similarly, by removing the constitutional court from the draft constitution, Karzai and his allies removed a venue where their opponents could challenge governmental conduct for constitutional compliance.

B. The CLJ Debates: The Haphazard Inclusion of Article 157 in the Constitution

After the executive removed the constitutional court from the CRC draft, it released the draft to the public, and the CLJ was convened to approve the new constitution.⁵⁶ The powers of the constitutional court to exercise judicial review and interpret the constitution came within the authorities of the Court in draft Article 121, while the constitutional court's power to police constitutional compliance was given to the president of the state.⁵⁷ Article 121 of the draft constitution revised by the executive and submitted to the CLJ, which did not have a constitutional court, read as follows: "At the request of the government or courts, the Supreme Court shall review the compliance of laws, legislative decrees and international treaties with the constitution. The Supreme Court shall have the authority to *interpret* laws, legislative decrees, international treaties and the *constitution*."⁵⁸

This draft came to the CLJ for approval. The CLJ continued to debate whether to include a separate constitutional court that could police constitutional compliance, review the constitutionality of legislation, and interpret the constitution.⁵⁹ The majority of the delegates at the CLJ wanted to reintroduce a constitutional court as existed in the CRC draft.⁶⁰ Delegates at the CLJ protested against the provision of the draft that gave

56. Arjomand, *supra* note 17, at 955.

57. QANUN-I ASSASI-YE JAMHURI-YE ISLAMI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN] 1382 (Dec. 2003), art. 121 (Afg.) (draft revised by the Executive) (on file with author) [hereinafter DRAFT CONSTITUTION REVISED BY THE EXECUTIVE].

58. *Id.* (emphasis added).

59. Rubin, *supra* note 15, at 15.

60. Interview with Abdul Rab Rasool Sayyaf, Chairman, Second Working Committee, Member, Constitutional *Loya Jirga*, in Kabul, Afg. (Mar. 26, 2015); DANISH, *supra* note 30, at 307.

the president the power to police constitutional compliance.⁶¹ Delegates at the CLJ complained that there will be no institution to judge constitutional compliance if the president disregarded the constitution.⁶² Being the sole judge of constitutional compliance, the president would misuse this power.⁶³

At the CLJ debates, almost all of the ten working groups proposed a separate constitutional court.⁶⁴ The draft that the CLJ Reconciliation Committee finalized included a separate constitutional court in Article 64 with the power to review the constitutionality of legislation.⁶⁵ Nevertheless, the version of the draft that came to the general meetings of the CLJ did not have the proposed constitutional court.⁶⁶ The proponents of the constitutional court stated that the Supreme Court, as it was then all comprised of *mullahs* (those versed in *sharia* law only) or clerics, who were not trained in public law or in constitutional law, should not be the institution to interpret the constitution.⁶⁷ They complained that such a Court would compromise fundamental rights, especially the rights of women and minorities, by using vague *sharia* law provisions, such as Article 3 of the Constitution.⁶⁸

Karzai and his supporters continued to argue against the inclusion of the constitutional court in the draft on the same grounds as they had done

61. Interview with Khalil Ahmad Khinjani, Member, Constitutional *Loya Jirga*, in Kabul, Afg. (May 18, 2015).

62. *Id.*

63. Interview with Abdul Shokor Waqif Hakimi, Member, Constitutional *Loya Jirga*, in Kabul, Afg. (Aug. 9, 2015).

64. *The Making of a Constitution*, *supra* note 11, at 567. The Constitutional *Loya Jirga* that adopted the 2004 Constitution was divided into ten different working groups to review the draft constitution. IRIN, *Afghanistan: Progress Being Made at Loya Jirga*, RELIEF WEB (Dec. 23, 2003), <https://reliefweb.int/report/afghanistan/afghanistan-progress-being-made-loya-jirga>. The *Loya Jirga* also had a Reconciliation Committee that reconciled the views of these working groups. *Id.*

65. See ASIF MOHSINI, TASWEEB-I QANUN ASSASI DAR LOYA JIRGA-YE JADI [THE ADOPTION OF THE CONSTITUTION IN THE LOYA JIRGA OF DECEMBER] 1382 [2010]; *see also* AN OVERVIEW OF THE CONSTITUTIONS OF AFGHANISTAN, *supra* note 39, at 179.

66. AN OVERVIEW OF THE CONSTITUTIONS OF AFGHANISTAN, *supra* note 39, at 179.

67. *See generally* INT'L CRISIS GRP., AFGHANISTAN: THE CONSTITUTIONAL LOYA JIRGA 8–9 (2003) (explaining Islam's influence on the legislative process of Afghanistan and the notable political power held by mullahs); *see also* Rubin, *supra* note 15, at 15.

68. Interview with Mohammad Ashraf Rasooli, *supra* note 33.

during the CRC debates.⁶⁹ The opponents of the constitutional court succeeded to convince the chairman of the CLJ not to include a constitutional court in the constitution.⁷⁰ When the rest of the members of the CLJ were informed, there was chaos in the CLJ and discussions over a constitutional court went without any final resolution, ending in deadlock between the majority of the CLJ members and the supporters of Karzai.⁷¹ In the last hours of the CLJ debates, the final proposal shrunk to a commission that would oversee the implementation of the constitution, but the constitution did not clarify how this Commission was to be set and what powers it would enjoy.⁷² The CLJ approved version of this Commission in Article 157 looked like the following: “An Independent Commission for the Supervision of the Implementation of the Constitution should be established in accordance with the provisions of the law.”⁷³

This last-minute inclusion of the Commission into the CLJ draft resulted in confusion over which institution should exercise all forms of judicial review, offer legal advice to the political branches of the government, and interpret the constitution. The confusion arose primarily because of the ambiguities in articles 121 and 157, especially due to the changes that the CLJ brought to Article 121. Before the inclusion of Article 157 in the draft constitution, which created the Commission, Article 121 read: “At the request of the government, or courts, the Supreme Court shall review laws, legislative decrees, international treaties as well as international covenants for their compliance with the

69. Rubin, *supra* note 15, at 15.

70. Karzai’s allies argued the following: first, Afghanistan might not be able to satisfy the budget of a separate constitutional court. Second, in 2004, Afghanistan did not have constitutional law experts that might serve on the constitutional court. And third, the creation of a separate constitutional court might create clashes of jurisdiction with a Supreme Court that might weaken both of these two institutions. See Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory*, ch. 4 (June 10, 2016) (unpublished Ph.D. dissertation, University of Washington) (on file with author) [hereinafter *A History and Analysis Through the Lens of Coordination*].

71. See *id.*

72. DRAFT CONSTITUTION ADOPTED BY THE CONSTITUTIONAL LOYA JIRGA, *supra* note 28, art. 157.

73. *Id.*

constitution. The Supreme Court shall have the authority to *interpret* laws, legislative decrees and the *constitution*.”⁷⁴

This language in Article 121 changed after the CLJ inserted Article 157 in the draft it finalized. Article 121, after the inclusion of Article 157 in the draft that was finalized by the CLJ read as the following: “At the request of the government, or courts, the Supreme Court shall review laws, legislative decrees, international treaties as well as international covenants for their compliance with the constitution, *and interpret them in accordance with the law*.”⁷⁵

In this language, the Court is not explicitly authorized to interpret the constitution as it was in the earlier version of Article 121. Here, Article 121 vaguely states “interpret them in accordance with the law,” making it difficult to understand whether the interpretation of the constitution is part of “interpret them in accordance with the law” or not.⁷⁶ The matter was complicated because Article 157 did not make clear either whether the Commission is the body whose job is to interpret the constitution.⁷⁷ This textual vagueness would later become the crux of the crisis over which institution, the Court or the Commission, could review the constitutionality of laws, offer legal advice on constitutional questions, and interpret the constitution.⁷⁸

Different views emerged after Article 157 was included in the constitution. Sarwar Danish, a member of the CDC and CRC, maintained that when Article 157 came into the constitution, it did not affect the powers of the Court to interpret the constitution under Article 121.⁷⁹ Other CRC members maintained that the major disagreement in the CLJ was whether the Court would be the most effective institution to interpret the constitution and review the constitutionality of legislation.⁸⁰ The majority of the delegates favored an institution other than the Court to

74. DRAFT CONSTITUTION REVISED BY THE EXECUTIVE, *supra* note 57, art. 121 (emphasis added).

75. DRAFT CONSTITUTION ADOPTED BY THE CONSTITUTIONAL LOYA JIRGA, *supra* note 28, art. 121 (emphasis added).

76. *Id.*

77. *Id.* art. 157.

78. See DEMPSEY & THIER, *supra* note 2, at 4; see also *Constitutional Interpretation*, *supra* note 1.

79. DANISH, *supra* note 30, at 307.

80. See A History and Analysis Through the Lens of Coordination, *supra* note 70, ch. 4.

interpret the constitution.⁸¹ When the Commission appeared in the draft, it was implicitly believed that it would have the power to interpret the constitution.⁸² Nevertheless, it remains contested to this day whether the Court or the Commission is the proper institution entrusted with the power to interpret the constitution and perform all types of judicial review functions.⁸³ In fact, both bodies share the power to interpret the constitution, review the constitutionality of legislation, and offer legal advice to the political branches of the government on constitutional issues.⁸⁴

III. CASES LEADING TO THE EMERGENCE OF A CRISIS OVER CONSTITUTIONAL INTERPRETATION AND THE CREATION OF THE COMMISSION

The CLJ adopted the 2004 Constitution, despite its textual vagueness on the issue of constitutional interpretation and who should perform all types of judicial review functions.⁸⁵ While the Afghan parliament did not pass a law on the jurisdiction and authorities of the Commission under Article 157 until late 2008, it unsuccessfully tried several times “to address the problem of judicial independence and constitutional jurisdiction of the . . . Court” and the Commission.⁸⁶ Karzai stood in the way of any parliamentary attempts to create the Commission because the existing structure of judicial review protected the executive’s interests.⁸⁷ For example, under the constitution, only the president has the authority to appoint all the judges of lower courts without any parliamentary approval.⁸⁸ Further, under Article 121, only the government and courts have standing to challenge the constitutionality of legislation before the Court.⁸⁹ Article 121 does not authorize members of the parliament,

81. *Id.*

82. Interview with Abdul Rab Rasool Sayyaf, *supra* note 60.

83. *Constitutional Interpretation*, *supra* note 1.

84. *Id.*

85. See DEMPSEY & THIER, *supra* note 2, at 3.

86. INT’L CRISIS GRP., REFORMING AFGHANISTAN’S BROKEN JUDICIARY 16 (2010), <https://www.crisisgroup.org/asia/south-asia/afghanistan/reforming-afghanistan-s-broken-judiciary> [hereinafter REFORMING AFGHANISTAN’S BROKEN JUDICIARY].

87. *Id.*

88. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 132.

89. *Id.* art. 121.

political parties, or other institutions to initiate judicial review proceedings before the Court.⁹⁰ Establishing the Commission would thus provide a venue for Karzai's opponents to challenge his actions for constitutional compliance.

During this time, the Court assumed the power to interpret the constitution, provide legal advice, and perform all types of judicial review functions.⁹¹ From 2005 to 2007, the Court issued a number of decisions and tried to establish jurisdiction over political disputes between the legislature and the executive.⁹² For example, in 2005, when the Afghan government failed to hold district council elections, a question emerged over how to appropriately constitute the *Mishrano Jirga* (the Afghan parliament's upper house) because district councils are supposed to form one-third of its members.⁹³ Karzai asked the Court to rule on how to form the upper house.⁹⁴ The Court ruled that, "in the absence of district council elections, the one-third of the membership of the upper house of Parliament left vacant by local elections could still be formed with two-thirds of its members chosen by Provincial Councils."⁹⁵ Under normal circumstances, provincial councils introduce one member

90. Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 HEIDELBERG J. INT'L L. 897, 911 (2004).

91. See SCOTT WORDEN & SYLVANA Q. SINHA, CONSTITUTIONAL INTERPRETATION AND THE CONTINUING CRISIS IN AFGHANISTAN (Nov. 7, 2011), <https://www.usip.org/publications/2011/11/constitutional-interpretation-and-continuing-crisis-afghanistan>; see also KAMALI, *supra* note 7, at 11; see generally Mohammad Qasim Hashimzai, *The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 665 (Rainer Grote & Tilmann J. Röder eds., 2012).

92. See generally Hashimzai, *supra* note 91 (a number of these Supreme Court decisions are discussed).

93. Article 140 of the Constitution states that "[c]ouncils shall be established to organize activities ... [and] attain active participation of the people in provincial administrations in districts and in villages.... Local residents shall elect members of these councils for [three] years through free, general, secret . . . [and] direct elections." 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art 140.

94. KAMALI, *supra* note 7, at 10.

95. WORDEN & SINHA, *supra* note 91, at 2.

to the upper house of the parliament.⁹⁶ This decision was accepted and the upper house was formed accordingly.⁹⁷

Similarly, in 2006, a dispute emerged between the parliament and the executive over the meaning of the word “*akthariyyat*” (majority) in parliamentary votes to approve governmental ministers, Supreme Court justices, and other high-ranking state officials whose appointment required the approval of the parliament.⁹⁸ The specific question was whether the term “majority votes” to approve these officials meant the majority votes of all members of the parliament or the majority votes of the members present in a single parliamentary session.⁹⁹ Again, Karzai asked the Court to rule on this question.¹⁰⁰ The Court held that *akthariyyat*, in parliamentary votes to approve officials whose appointment require parliamentary approval, means the majority votes of the members present in a session not the majority votes of all members of the parliament.¹⁰¹

Parliament apparently accepted these decisions, and they seemed to indicate that the Court possessed final authority to interpret the constitution, exercise judicial review, and provide legal advice to the executive.¹⁰² However, this implicit understanding was challenged in May 2007, when the Court invalidated the parliament’s decision to remove then Foreign Minister Spanta from his ministerial post.¹⁰³ Minister Spanta’s case, for the first time, intensified the question of which body, the Court or the Commission, should interpret the constitution and perform all types of judicial review functions.¹⁰⁴ This case also inflamed the parliamentary debate over the formation of the Commission and the clarification of its mandate.¹⁰⁵ Moreover, the

96. See *National Assembly*, PAJWOK AFG. NEWS, <http://www.elections.pajhwok.com/en/content/national-assembly> (last visited Nov. 25, 2017).

97. WORDEN & SINHA, *supra* note 91, at 2.

98. KAMALI, *supra* note 7, at 11 n.38.

99. *Id.*

100. *Id.*

101. *Id.*; see generally Hashimzai, *supra* note 91.

102. WORDEN & SINHA, *supra* note 91, at 2.

103. See Carlotta Gall, *Afghan Legislators Vote Out Foreign Minister*, N.Y. TIMES (May 13, 2007), <http://www.nytimes.com/2007/05/13/world/asia/13kabul.html>.

104. DEMPSEY & THIER, *supra* note 2, at 3.

105. See *id.* at 4; see also KAMALI, *supra* note 7, at 10–15.

contested parliamentary elections of 2010 further deepened the crisis over who should interpret the constitution, offer legal advice to the political branches of the government, and perform all types of judicial review functions.¹⁰⁶

In both cases, citing textual vagueness in the 2004 Constitution, the parliament opposed the Court's power to interpret the constitution or resolve political disputes between the legislature and the executive.¹⁰⁷ The Court became involved in both of these cases due to Karzai.¹⁰⁸ On both occasions, the Court decided in favor of the president.¹⁰⁹ Nevertheless, the decisions of the Court in both cases created severe political backlashes that undermined the Court's independence, threatened its institutional security, and dramatically limited its authority to interpret the constitution and perform all types of judicial review functions.¹¹⁰

A. Foreign Minister Spanta's Case: Parliament's Removal Powers and its Judicial Scrutiny

In April 2007, the Iranian government began to forcefully deport Afghan refugees.¹¹¹ In May 2007, using its authority under Article 92 of the Constitution,¹¹² the Afghan parliament impeached Mohammad Akbar

106. See Shamshad Pasarlay, *When Courts Decide Not to Decide: Understanding the Afghan Supreme Court's Struggle to Decide the Fate of the Dismissed Ministers*, I-CONNECT (Mar. 22, 2017), <http://www.iconnectblog.com/2017/03/when-courts-decide-not-to-decide-understanding-the-afghan-supreme-courts-struggle-to-decide-the-fate-of-the-dismissed-ministers/> [hereinafter *When Courts Decide Not to Decide*].

107. *Id.*

108. *Constitutional Interpretation*, *supra* note 1.

109. WORDEN & SINHA, *supra* note 91, at 2; see also DEMPSEY & THIER, *supra* note 2, at 3.

110. *When Courts Decide Not to Decide*, *supra* note 106.

111. *Iran Deports Thousands of Illegal Afghan Workers*, IRIN (Apr. 30, 2007), <http://www.irinnews.org/report/71865/afghanistan-iran-iran-deports-thousands-illegal-afghan-workers>.

112. Article 92 of the Constitution states that the parliament, "on the proposal of twenty percent of all its members" can summon governmental ministers. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 92. If the explanations given are not satisfactory, the parliament "shall consider the issue of a no- confidence vote. *Id.* The no-confidence vote . . . shall be explicit, direct [, and] . . . based on convincing reasons." *Id.* The majority of all members of the parliament shall approve the vote. *Id.*

Akbar, then Minister for Refugees and Repatriation, and Rangin Dadfur Spanta, then Minister for Foreign Affairs, questioning both about the mass deportation of Afghan refugees.¹¹³ During the impeachment proceedings, the two Ministers' explanations did not apparently convince or satisfy the parliament.¹¹⁴ As a result, the Ministers became the subject of no-confidence votes.¹¹⁵ Minister Akbar lost by eleven votes.¹¹⁶ However, the vote against Minister Spanta was problematic because it was not decisive.¹¹⁷ When the votes were counted, the no-confidence vote came just one short of the required quorum to dismiss a minister.¹¹⁸ Two mismarked votes were also found, which caused confusion about the correct and proper vote result.¹¹⁹ Two days later, in May 2007, the parliament decided to cast a second no-confidence vote against Minister Spanta.¹²⁰ At the second voting, the parliament succeeded in stripping Minister Spanta of his ministerial post.¹²¹

This second voting begot confusion over its constitutionality, and Karzai refused to appoint the successor of Minister Spanta.¹²² As the parliament insisted on a replacement for Minister Spanta, Karzai asked the Court to rule both on the constitutionality of the parliament's original action – impeachment – against Minister Spanta and the legality of the second voting.¹²³ The parliament reacted strongly to the President's referral, claiming that the Court had no jurisdiction over this matter.¹²⁴ The parliament argued that while Article 121 of the Constitution authorized the Court to review the constitutionality of parliamentary legislation, it did not empower the Court to rule on the constitutionality

113. KAMALI, *supra* note 7, at 10.

114. *Id.*

115. *Id.*

116. *Afghan Parliament Votes to Sack Refugees Minister*, THE NEWS INTERNATIONAL (May 11, 2007), <https://www.thenews.com.pk/archive/print/650180>.

117. KAMALI, *supra* note 7, at 10; *see also* Gall, *supra* note 103; *see also* DEMPSEY & THIER, *supra* note 2, at 3.

118. *See* KAMALI, *supra* note 7, at 10; *see also* DEMPSEY & THIER, *supra* note 2, at 3.

119. KAMALI, *supra* note 7, at 10.

120. *Id.*; *see also* DEMPSEY & THIER, *supra* note 2, at 3.

121. Gall, *supra* note 103; *see also* KAMALI, *supra* note 7, at 10.

122. *See* DEMPSEY & THIER, *supra* note 2, at 3.

123. *See When Courts Decide Not to Decide*, *supra* note 106.

124. DEMPSEY & THIER, *supra* note 2, at 3; *see also* KAMALI, *supra* note 7, at 10.

of the parliament's appointment or removal powers.¹²⁵ Therefore, the parliament made it clear that it would not accept the Court's decision in this respect.

Despite the parliament's objections, the Court decided to rule on the constitutionality of the parliament's decision to remove Minister Spanta. The Court ruled that while the parliament did have an implied constitutional right to remove a minister under Article 92 of the Constitution,¹²⁶ the vote against Minister Spanta was unconstitutional for two main reasons.¹²⁷ First, the Court found that the reason for which Minister Spanta became the subject of the no-confidence vote – the mass deportation of Afghan refugees from Iran – was not something within the rational control of the Foreign Minister.¹²⁸ The Court stated that a parliamentary vote of no-confidence should be based on valid and convincing reasons.¹²⁹ The Court emphasized that the reasons should underlie the fault of a minister on the “commission or omission of a responsibility.”¹³⁰ The basis of a no-confidence vote, according to the Court, cannot be the commission or omission of an action related to the subjects that a minister does not have control over.¹³¹ The Court then examined a number of Foreign Ministry documents related to its communication with the Iranian government on the issue of Afghan refugees and found that the Foreign Minister had taken all the necessary steps to prevent the deportation of Afghans.¹³² However, preventing the Iranian government from its decision to deport Afghan refugees was not within the authority or the responsibility of the Foreign Minister.¹³³ The

125. DEMPSEY & THIER, *supra* note 2, at 3; *see also* 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 121.

126. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 92.

127. *See* FARID HAMIDI & ARUNI JAYAKODY, SEPARATION OF POWERS UNDER THE AFGHAN CONSTITUTION: A CASE STUDY 24 (2015), <http://reliefweb.int/report/afghanistan/separation-powers-under-afghan-constitution-case-study>; *see also* DEMPSEY & THIER, *supra* note 2, at 3.

128. DEMPSEY & THIER, *supra* note 2, at 3.

129. HAMIDI & JAYAKODY, *supra* note 127, at 24.

130. *Id.*

131. *Id.*

132. *See id.*

133. *Id.* at 24–25.

Court thus ruled that the basis of the no-confidence vote was not valid or convincing as required by Article 92 of the Constitution.¹³⁴

Second, referring to the second round of voting, the Court ruled that the parliament did not follow appropriate procedures in voting Minister Spanta out of office.¹³⁵ The Court specifically referred to Article 65 of the parliament's rules of procedures,¹³⁶ which states that after the result of a no-confidence vote is announced, "another debate cannot be held over an approved subject."¹³⁷ The Court thus held that opening a new debate on the same question, the impeachment of Minister Spanta, was illegal under the parliament's internal rules of procedure.¹³⁸ In addition, the Court stated that the participation of new members who were unaware of the reason for Minister Spanta's impeachment during the second vote made the impeachment and subsequent removal of the Minister illegal.¹³⁹

The parliament rejected the Court ruling, stating that the Court did not have jurisdiction to resolve this dispute.¹⁴⁰ As a result, confusion arose over which institution could hear and resolve such disputes.¹⁴¹ In response to this crisis, the executive, Karzai, and the Court "each proposed legislation that would resolve [these] jurisdictional questions."¹⁴² The Court proposed an amendment to the Law on the Organization and Jurisdiction of the Courts (2005) that attempted to clarify the Court's jurisdiction allowing it to adjudicate on such cases.¹⁴³ The Court's proposal attempted to amend Article 24 of the Law on the Organization and Jurisdiction of the Courts to explicitly authorize the Court to interpret the constitution and to resolve other disputes resulting from the application of law and the exercise of legal authority between

134. *Id.* at 25; *see also* DEMPSEY & THIER, *supra* note 2, at 3; *see also* KAMALI, *supra* note 7, at 10.

135. DEMPSEY & THIER, *supra* note 2, at 3; *see also* KAMALI, *supra* note 7, at 10.

136. HAMIDI & JAYAKODY, *supra* note 127, at 25.

137. OSOL-I WAZAYEF-I DAKHILI-I WOLESI JIRGA [INTERNAL RULES OF PROCEDURE OF DUTY OF WOLESI JIRGA], art. 65(5) (1384 [2006]), <http://wolesi.website/pve/document.aspx?Cat=9>.

138. HAMIDI & JAYAKODY, *supra* note 127, at 25.

139. *Id.*

140. *When Courts Decide Not to Decide*, *supra* note 106.

141. *See* DEMPSEY & THIER, *supra* note 2, at 3.

142. *Id.* at 4.

143. *Id.*

the legislature and the executive.¹⁴⁴ The parliament, however, rejected the Court's proposal, stating that under Article 121, the Court did not have the power to interpret the constitution or resolve political disputes between the legislature and the executive.¹⁴⁵

At the same time, the executive drafted a law on the Commission under Article 157 of the Constitution.¹⁴⁶ This law would have allowed the Commission to perform *a priori* review of governmental bills before the parliament's approval.¹⁴⁷ The executive's proposed legislation also empowered the Commission to provide legal advice on questions emerging from the constitution and to review the laws of previous governments for their compliance with the constitution, advising the president in this respect, who would then take the necessary action.¹⁴⁸ Nevertheless, the parliament amended the draft law of the Commission removing the explicit power to provide an advisory opinion on legislation before the approval of the president.¹⁴⁹ Instead, the parliament included language that gave the Commission the power to interpret the constitution on the request of the president, the parliament, and the Court.¹⁵⁰ Karzai, however, vetoed this legislation because he believed that the language in Article 8 of the law of the Commission, which empowered the Commission to interpret the constitution, violated articles 121, 122, and 157 of the Constitution.¹⁵¹

Karzai further argued that: (1) Article 121 of the Constitution authorized only the Court to interpret the constitution¹⁵² and (2) the

144. *See id.*

145. HAMIDI & JAYAKODY, *supra* note 127, at 25; *see also* 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 121.

146. DEMPSEY & THIER, *supra* note 2, at 4.

147. *Id.*

148. *Id.*

149. HAMIDI & JAYAKODY, *supra* note 127, at 27.

150. QANUN-I KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [LAW OF THE INDEPENDENT COMMISSION FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION] 1388 (2009), art. 8(1) (Afg.) [hereinafter LAW OF THE INDEPENDENT COMMISSION].

151. HAMIDI & JAYAKODY, *supra* note 127, at 27. Article 122 of the Constitution states that "[n]o law shall, under any circumstances, exclude any case or area from the jurisdiction of the [judiciary] ... and submit it to another authority." 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 122. Article 157 stipulates the establishment of the Commission. *Id.* art. 157.

152. DEMPSEY & THIER, *supra* note 2, at 5.

Constitution granted the Commission only the power to supervise the implementation of the constitution and not the power to interpret it.¹⁵³ In September 2008, the parliament overrode Karzai's veto of the law of the Commission by a two-thirds majority, making it enforceable legislation.¹⁵⁴ Karzai then referred the Commission's law to the Court for review of its constitutionality.¹⁵⁵ The Court promptly ruled in the executive's favor, invalidating those provisions of the law that authorized the Commission to interpret the constitution.¹⁵⁶ "In June 2009, Karzai submitted the [Court's] ruling against the establishment of the [C]ommission" for publication in the Official Gazette.¹⁵⁷ The parliament yet again refused to accept the opinion of the Court on the unconstitutionality of the law of the Commission, claiming that the Court faced "a conflict of interest in making its decisions" without providing further details.¹⁵⁸

Finally, the parliament pushed ahead with the approval of candidates appointed by Karzai for membership in the Commission.¹⁵⁹ During the June 2010 confirmation hearings before the parliament, Commission nominees acknowledged that they would exercise the Commission's authority to interpret the constitution and provide legal advice, so long as the parliament supports the Commission.¹⁶⁰ Upon its creation, and backed strongly by the parliament, the Commission undertook the task of interpreting the constitution despite opposition from the executive and

153. HAMIDI & JAYAKODY, *supra* note 127, at 27.

154. DEMPSEY & THIER, *supra* note 2, at 5. Article 94 of the Constitution authorizes the parliament to override the veto of the president by two-thirds majority. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 94.

155. HAMIDI & JAYAKODY, *supra* note 127, at 27.

156. QARARI QAZAI SHOMARA 5 STARA MAHKAMA-YE AFGHANISTAN RAJI BA ADAM MOTABIQAT-I MAWAD-I QANUN-I KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI BA QANUN ASSASI [OPINION NO. 5 OF THE SUPREME COURT ON THE UNCONSTITUTIONALITY OF LAW OF THE INDEP. COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1388 [2009], OFFICIAL GAZETTE NO. 986 (Afg.) (a translation of the Court's opinion is provided in Appendix I).

157. REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 86, at 16.

158. HAMIDI & JAYAKODY, *supra* note 127, at 28; *see also Constitutional Interpretation*, *supra* note 1.

159. REFORMING AFGHANISTAN'S BROKEN JUDICIARY, *supra* note 86, at 16.

160. *Id.*

the Court.¹⁶¹ The status of the Commission's opinion, however, remains unclear.

B. The 2010 Contested Parliamentary Elections: The Constitutional Interpretation Crisis Deepens

In September 2010, the Afghan government held its second parliamentary elections after the adoption of the 2004 Constitution.¹⁶² The government held the 2010 parliamentary elections shortly after the 2009 contested presidential elections in which claims of fraud and electoral engineering had severely undermined the institutional viability and independence of the Independent Electoral Commission (IEC).¹⁶³ Although the IEC took all necessary measures and employed reforms to prevent fraud, its performance was seriously challenged.¹⁶⁴ Two main concerns were security and flaws in Afghanistan's electoral system – both the laws and institutions.¹⁶⁵ These flaws were highlighted when the IEC announced the long-delayed preliminary results of the parliamentary elections, which were promptly rejected by Karzai and his administration.¹⁶⁶

The IEC later announced the final certified results of the 2010 parliamentary elections, and the international community approved them.¹⁶⁷ However, the government and a number of defeated candidates still rejected the final certified results.¹⁶⁸ The defeated candidates began to hold protest meetings around the country demanding that (1) the IEC and the government should declare the September 2010 parliamentary elections illegitimate, (2) the government should hold new parliamentary

161. *Constitutional Interpretation*, *supra* note 1.

162. NAT'L DEMOCRATIC INST., THE 2010 WOLESI JIRGA ELECTIONS IN AFGHANISTAN 15 (2011), <https://www.ndi.org/sites/default/files/Afghanistan-2010-election-observers-final-report.pdf>.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. DEMOCRACY INT'L, ELECTION OBSERVATION MISSION: AFGHANISTAN PARLIAMENTARY ELECTIONS 2010 39 (2011), http://democracyinternational.com/media/DI%20Afghanistan%202010%20EOM%20Final%20Report_web.pdf.

168. *See id.* at 42.

elections using computerized national ID cards, and (3) the government should prosecute all individuals involved in electoral crimes.¹⁶⁹ The IEC refused to declare the election illegitimate and made it clear that the results of the election were irreversible and that the IEC is the only entity allowed to investigate electoral complaints.¹⁷⁰

Unsatisfied with the final results of the elections, Karzai moved to appoint a special court to investigate complaints related to the elections “with [a] specific focus on identifying criminal offenses.”¹⁷¹ Afghanistan’s 2004 Constitution and electoral laws “do not provide for the establishment of a special court to review election results.”¹⁷² This power is vested in the IEC.¹⁷³ The question of the constitutionality of the Special Election Court (SEC) thus caused consternation. The SEC claimed it had the power to invalidate election results, call for recounts, and order re-runs of elections in specified provinces.¹⁷⁴ The SEC argued that the Court had the power to authorize the establishment of a special court on the recommendation of the president of the country.¹⁷⁵ Nevertheless, the sitting parliament and the Commission both argued that the SEC is unconstitutional because only the IEC has the power to resolve electoral disputes.¹⁷⁶

Karzai then asked the Court to rule on the constitutionality of the SEC. The Court ruled that the establishment of the SEC to investigate

169. *Id.* at 3.

170. *Id.* at 43.

171. *Id.* at 43–44.

172. *Id.* at 44.

173. QANUN ENTEKHABAT [ELECTION LAW] 1389 (2010), art. 57 (Afg.).

174. *See* DEMOCRACY INT’L, *supra* note 167, at 44.

175. *See id.*; *see also* GHIZAL HARESS, ADJUDICATING ELECTION COMPLAINTS: AFGHANISTAN AND THE PERILS OF UNCONSTITUTIONALISM 22 (2014), <https://areu.org.af/wp-content/uploads/2016/02/1404E-Adjudicating-Election-Complaints-A-Case-Study-of-the-Special-Election-Tribunal-2010-2.pdf> [hereinafter ADJUDICATING ELECTION COMPLAINTS].

176. KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [INDEP. COMM’N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1389 [2010], NAZARYA-YE HUQUQI KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI DAR RABITA BA MOTABIQAT-I MAHKAMA-YE KHAS-I ENTEKHABAT PARLAMANI-YE 1389 [LEGAL OP. OF THE INDEP. COMM’N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION, REVIEWING THE CONSTITUTIONALITY OF THE SPECIAL ELECTION COURT TO ADJUDICATE COMPLAINTS RELATED TO THE 2010 PARLIAMENTARY ELECTION] (Afg.).

electoral complaints was consistent with the constitution.¹⁷⁷ The Court stated that the president of the state has the power to establish a special court and submit a particular dispute to that special court.¹⁷⁸ The Court's decision angered the winning candidates to the parliament who refused to accept the opinion of the Court, arguing that the Court's jurisdiction was limited to the review of the constitutionality of legislation under Article 121 of the Constitution and did not extend to reviewing election complaints.¹⁷⁹

Even though the SEC had not finished its investigation, Karzai inaugurated the new parliament.¹⁸⁰ In its first move, the newly inaugurated parliament declared the SEC an illegal body.¹⁸¹ Despite the parliament's opposition, the SEC declared its findings, disqualifying sixty-two winning candidates and nominating their replacements.¹⁸² The parliament, however, did not accept the SEC's decision and refused to bring any changes to the electoral results.¹⁸³ In an effort to reduce a possible constitutional crisis, Karzai dissolved the SEC and ordered that the IEC should examine the allegations of fraud.¹⁸⁴ In late August 2011, given severe political pressure, the IEC declared that only nine sitting members should be disqualified and replaced.¹⁸⁵

In the end, each body, the Court and the Commission, issued a different opinion on the constitutionality of the SEC.¹⁸⁶ In fact, the Court, much to the anger of the new parliament, aligned itself with Karzai, while the Commission sided with the parliament and the electoral bodies in adjudicating that the creation of the SEC did not fall within the framework of the constitution and was thus unconstitutional.¹⁸⁷ From this decision on, the parliament has always backed the Commission to

177. DEMOCRACY INT'L, *supra* note 167, at 45.

178. *Id.*

179. *See id.* at 42, 45.

180. *Id.* at 45.

181. NAT'L DEMOCRATIC INST., THE 2010 WOLESI JIRGA ELECTIONS IN AFGHANISTAN 3 (2011), <https://www.ndi.org/sites/default/files/Afghanistan-2010-election-observers-final-report.pdf>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* DEMOCRACY INT'L, *supra* note 167, at 44–45.

187. *Id.* at 43–45.

interpret the constitution and offer legal advice on constitutional questions while rejecting the Court's power to do so.

IV. SEVEN YEARS SINCE THE ESTABLISHMENT OF THE COMMISSION: WHAT THE COURT AND THE COMMISSION DO?

Constitutional ambiguities surrounding the authorities of the Court and the Commission led to the creation of two competing institutions with overlapping powers to interpret the constitution and review the constitutionality of legislation. After the Commission was established, the legislature has always supported the Commission to interpret the constitution, perform *a priori* review of governmental bills, and offer legal advice to the parliament.¹⁸⁸ The executive, however, continued to treat the Court as the only institution entrusted by the constitution with the power to interpret the constitution and review the constitutionality of legislation.¹⁸⁹ As a result of this dual institutional mechanism, there were severe political crises every time a dispute emerged between the legislature and the executive over the results of elections and/or the appointment or removal of senior government officials.¹⁹⁰

Today, seven years after the establishment of the Commission, it seems that the crisis over which institution should interpret the constitution, offer legal advice, and review the constitutionality of legislation has subsided.¹⁹¹ A political "consensus, though implicit, has emerged" – one that has vested the two institutions with different kinds of constitutional review power.¹⁹² More importantly, the Court "no longer seems to challenge the authority of the . . . Commission to interpret the Constitution."¹⁹³ Likewise, while the executive was the first to challenge the authority of the Commission to interpret the constitution, it no longer does so.¹⁹⁴ Soon after the creation of the Commission in 2010, the executive also began requesting the Commission's advisory

188. *See Constitutional Interpretation*, *supra* note 1.

189. *Id.*

190. WORDEN & SINHA, *supra* note 91, at 3.

191. *Constitutional Interpretation*, *supra* note 1.

192. *Id.*

193. *Id.*

194. *See id.*

opinions on constitutional questions.¹⁹⁵ Furthermore, responding to a request by the Commission for constitutional review of draft legislation, President Karzai issued a Presidential Decree in 2010 that authorized the Commission to perform *a priori* review of governmental bills before the approval of the parliament.¹⁹⁶ This meant that such abstract review of legislation would be performed by the Commission, not the Court, which has the power to perform judicial review under the constitution.

Strongly held views are thus apparently abandoned because this overlapping system of constitutional interpretation and judicial review serves the interests of both the legislature and the executive, as neither the Court nor the Commission has been successful to issue judicial review opinions that could bind the executive or the legislature.¹⁹⁷ Rather, both of these institutions have been treated as consultative agents, providing legal advice to the political branches of the government.¹⁹⁸

As a result, it seems that a political practice has emerged, showing that a pattern of acceptance has surfaced. This practice has not only calmed “the crisis over constitutional interpretation, but has also clarified, to some extent, the role of the Commission” and the Court when it comes to constitutional interpretation and judicial review practices.¹⁹⁹ In other words, the Commission has reached an interesting *modus vivendi* with the Court, which has been ratified by the governing elites of Afghanistan, who appear to use the two institutions for different functions.²⁰⁰ There appear to be distinctions, however, between the Commission and the Court regarding their roles in judicial review and constitutional interpretation, and the following sections attempt to explain these differences.

A. Constitutional Adjudication Powers of the Commission

The work of the Commission thus far reveals that the Commission performs three functions as part of its authority to supervise the

195. *Id.*

196. WORDEN & SINHA, *supra* note 91, at 3.

197. *See Constitutional Interpretation, supra* note 1.

198. *See id.*

199. *Id.*

200. *See id.*

implementation of the constitution. All of these functions take place in the form of legal advice and advisory opinions to the political branches of the government.²⁰¹ Furthermore, the Commission is legally required to publish an annual report on the implementation of the constitution to the president of the state.²⁰² However, this has not taken place so far.²⁰³

First, the Commission interprets the constitution, and as such, offers interpretive opinions to the parliament, the president, the government, and the Court.²⁰⁴ Although the Court has not yet requested an opinion, on one occasion, the Commission has issued an advisory opinion addressed to the Court on the establishment of a special court to adjudicate on the corruption scandal of Kabul Bank.²⁰⁵ The Commission exercises its authority to interpret the constitution under Article 8(1) of its law, which states that the Commission can interpret the constitution upon the request of the parliament, the Court, and the executive.²⁰⁶ Although the Court determined Article 8(1) of the law of the Commission as unconstitutional, the parliament continues to request the Commission for constitutional interpretation opinions.²⁰⁷

During the early days of the Commission's functioning, only the parliament could request the Commission for constitutional interpretation; later, however, the executive also began to refer constitutional interpretation requests to the Commission when the executive's interests allowed it.²⁰⁸ For example, the Commission, upon

201. *See id.*

202. LAW OF THE INDEPENDENT COMMISSION, *supra* note 150, art. 8(1).

203. *See* GHIZAAL HARESS, JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE 26 (Alyssa Hoseman ed., 2017) [hereinafter JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE].

204. *Constitutional Interpretation*, *supra* note 1.

205. KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [INDEP. COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1391 [2012], MASHWARA-YE HUQUQI KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI RAJI BA EJAD-I MAHKAMA-YE KHAS-I KABUL BANK BA SETARA MAHKAMA [LEGAL ADVICE OF THE INDEP. COMM'N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION ON THE CREATION OF THE KABUL BANK COURT TO THE SUPREME COURT], OPINION No. 36 (Afg.) (the Commission in this opinion stated that it is in the authority of the Supreme Court to create a new and special court and refer to it a special case).

206. LAW OF THE INDEPENDENT COMMISSION, *supra* note 150, art. 8(1); *see* discussion *supra* Section III.A.

207. *Constitutional Interpretation*, *supra* note 1.

208. *See id.*

the request of Karzai, issued an advisory opinion on the delays of the 2014 presidential election.²⁰⁹ In its opinion, the Commission justified this delay of the election for technical reasons.²¹⁰ Similarly, the Commission interpreted Article 7 of the Constitution, upon the request of the Ministry of Justice, on the status of international treaties in domestic courts,²¹¹ stating that international treaties only become effective in Afghanistan when the parliament approves and implements them through enacting and implementing legislation.²¹² The main reason for the executive's shift in practice was that the fragmented system of constitutional interpretation allowed the executive to submit simultaneous requests to both the Court and the Commission as a "means of hedging bets in case one institution offer[ed] a more favorable opinion."²¹³

Second, the Commission seems to be consolidating its own role; it regularly conducts pre-promulgation abstract reviews of legislation – reviewing laws before they go into effect.²¹⁴ The Commission apparently ends up performing this review in the form of legal advice in accordance with a 2010 Presidential Decree.²¹⁵ Both the legislature and the executive

209. See KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [INDEP. COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1393 [2014], NAZARYA-YE HUQUQI WA TAFSIRI KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI BARAI RAEES JAMHURI RAJI BA TA'KHIR DAR ENTEKHABAT REYASAT-I JAMHURI WAS MA'DA-YE 61 QANUN ASSASI [LEGAL & INTERPRETIVE OP. OF THE INDEP. COMM'N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION TO THE PRESIDENT OF AFG. ON POSTPONING THE 2014 PRESIDENTIAL ELECTION AND ARTICLE 61 OF THE CONSTITUTION], OPINION NO. 73 (Afg.).

210. *Id.*

211. Article 7 of the Constitution states that "[t]he state shall observe the United Nations Charter, ... international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights." 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 7.

212. KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [INDEP. COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1391 [2012], NAZARYA-YE TAFSIRI KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI RAJI BA MA'DA-YE 7 QANUN ASSASI BA WAZARAT-I A'DLIYA [INTERPRETIVE OPINION OF THE INDEPENDENT COMMISSION FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION ON ARTICLE 7 OF THE CONSTITUTION (DEALING WITH INTERNATIONAL TREATIES) TO THE MINISTRY OF JUSTICE], OPINION NO. 43 (Afg.).

213. WORDEN & SINHA, *supra* note 91, at 3.

214. *Constitutional Interpretation*, *supra* note 1.

215. *Id.*; see also WORDEN & SINHA, *supra* note 91, at 3.

have made such requests to the Commission.²¹⁶ For instance, in July 2012, the Minister of the Government on Parliamentary Affairs requested the Commission to review the constitutionality of the draft law on combating administrative corruption.²¹⁷ Similarly, in September 2012, the IEC requested the Commission to review the constitutionality of the proposed law of elections; the Commission issued an opinion stating that some of the law's provisions did not comply with the constitution.²¹⁸ The parliament sends most of these requests to the Commission.²¹⁹

Third, the Commission offers legal advice to the president and the parliament on issues arising from the implementation of the constitution. Notably, Article 8(3) of the law of the Commission states that the Commission has the duty to offer legal advice to the president and the parliament.²²⁰ In fact, "offering legal advice to the president and the [parliament] comprises a major part of the workload of the [Commission]."²²¹ The parliament "has been an active participant in this respect, with more references to the Commission than the president or his cabinet for legal advice on constitutional matters."²²² With these three types of functions, it appears that the Commission almost acts as the proposed constitutional court would have done under the earlier drafts of the Constitution, except that the Commission's decisions are not binding.

In short, after its controversial inclusion in the Constitution during the 2002–2004 constitutional negotiations, it appears that the Commission

216. *Constitutional Interpretation*, *supra* note 1.

217. See KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [INDEP. COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1391 [2012], NAZARYA-YE HUQUQI KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI DAR RABITA BA MOTABIQAT-I TARHI QANUN MOBARIZA BA FASAD- EDARI BA QANUN ASSASI [LEGAL OP. OF THE INDEP. COMM'N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION ON THE COMPLIANCE OF THE LAW ON COMBATING ADMIN. CORRUPTION WITH THE CONSTITUTION, OPINION No. 41 (Afg.).

218. *Constitutional Interpretation*, *supra* note 1.

219. See generally KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [INDEP. COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1393 [2014], MAJMUA-YE TAFSIR HA, NAZARIYA HA WA MASHWARA HAI HUQUQI-YE KAMISON-I MUSTAQIL-I NIZARAT BAR TATBIQ-I QANUN-I ASSASI [THE COLLECTION OF INTERPRETIVE AND LEGAL OP. OF THE INDEP. COMM'N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION] (Afg.).

220. LAW OF THE INDEPENDENT COMMISSION, *supra* note 150, art. 8(3).

221. *Constitutional Interpretation*, *supra* note 1.

222. *Id.*

has become a real institution with some capacity, which was beyond what the drafters of the constitution would have predicted. The Commission seems to have acquired a significant interpretive and review authority through a practice of advising the political branches coupled with executive and legislative respect or at least a lack of disrespect for its advisory opinions.

B. Constitutional Adjudication Powers of the Supreme Court

Somewhat distinct from the Commission, the Court seems to exercise two types of judicial review functions: concrete review of laws and post-promulgation abstract review of laws.²²³ The Court's practice shows that its judicial review power includes exercising these two types of review.²²⁴ Although there is no evidence to indicate that the Court has exercised a concrete judicial review of legislation, it has actively exercised post-promulgation abstract reviews of parliamentary legislation.²²⁵ For instance, on the request of the Ministry of Foreign Affairs, in September 2014, the Court issued an opinion reviewing the constitutionality of the law of Diplomatic and Consular Staff of Afghanistan that the parliament previously passed.²²⁶ The Court invalidated some provisions of this law.²²⁷

Although Article 121 is vague on whether the Court can interpret the constitution, implicitly it implies constitutional interpretation power for the Court. Under Article 121, the Court interprets the constitution, as it often does while reviewing the constitutionality of legislation.²²⁸ "However, since the establishment of the [Commission], the [Court] has hardly ever issued an interpretive opinion."²²⁹ But this does not mean that the Court has been completely stripped of its power to interpret the

223. *Id.*

224. *Id.*

225. *Id.*

226. Appendix II *infra* provides a translation of this Court opinion to show how the Court performs such form of judicial review.

227. DECISION NO. 20 OF THE HIGH COUNCIL OF THE SUPREME COURT ON THE UNCONSTITUTIONALITY OF ARTICLES 5(1) & 8 OF THE LAW OF DIPLOMATIC & CONSULAR STAFF OF AFGHANISTAN, OFFICIAL GAZETTE NO. 1114 (2014).

228. Appendix II *infra* also shows how the Court interprets the constitution when it reviews the constitutionality of legislation.

229. *Constitutional Interpretation*, *supra* note 1.

constitution. In fact, Karzai played a “strategic role and sent questions on constitutional matters to both institutions depending on which best secured his interests.”²³⁰ For example, Karzai referred to both the Commission and the Court to find a way that could legitimize the establishment of the SEC.²³¹ When the Commission declared the SEC unconstitutional, Karzai turned to the Court to justify the creation of the SEC.²³²

While the power of the Commission to interpret the constitution remains uncontested, at least for now, the parliament strongly objects to the power of the Court to interpret the constitution or resolve political disputes.²³³ For example, in November 2016, the parliament voted to remove seven key ministers from their ministerial posts.²³⁴ The executive asked the Court to interpret Article 92 of the Constitution to determine the limits of the parliament’s removal powers.²³⁵ The parliament, however, strongly objected to the executive’s referral, arguing that the Court did not have the power to interpret the constitution.²³⁶ No branch apparently contests the power of the Court to exercise judicial review, including both post-promulgation abstract review of laws and concrete judicial review.

However, it should be noted that with the formation of the National Unity Government under the leadership of President Ashraf Ghani in 2014, it appears that governmental practice has shifted.²³⁷ President Ghani apparently treats the Court as the proper body to interpret the constitution.²³⁸ For instance, since its formation in September 2014, the

230. *Id.*

231. See discussion *supra* Section III.B.

232. ADJUDICATING ELECTION COMPLAINTS, *supra* note 175, at 21.

233. See *Constitutional Interpretation*, *supra* note 1.

234. *When Courts Decide Not to Decide*, *supra* note 106.

235. Thomas Ruttig, *Parliament Kicks Out Ministers Again: A Multi-Dimensional Power Struggle*, AFG. ANALYSTS NETWORK (Nov. 19, 2016), <https://www.afghanistan-analysts.org/parliament-kicks-out-ministers-again-a-multi-dimensional-power-struggle/>.

236. *MPs Criticize Government over Supreme Court Move Following Dismissal of Ministers*, TOLONews (Nov. 19, 2016), <http://www.tolonews.com/index.php/afghanistan/28425-mps-criticize-govt-over-supreme-court-move-following-dismissal-of-ministers>.

237. See *When Courts Decide Not to Decide*, *supra* note 106.

238. See *Presence of Lawmakers Legal Until Parliamentary Elections Held: MPs*, TOLONews (June 16, 2015), <http://www.tolonews.com/afghanistan/presence-lawmakers-legal-until-parliamentary-elections-held-mps>.

National Unity Government has only made two constitutional interpretation requests, and it has submitted both to the Court, not to the Commission.²³⁹ At the same time, President Ghani requests the Commission, not the Court, for advisory opinions on constitutional questions,²⁴⁰ meaning that the fragmented system of judicial review and constitutional interpretation continues under this new administration.

C. Can the Current Modus Vivendi Survive the Proposed Constitutional Reform under the National Unity Government Agreement?

The flawed election system in Afghanistan to elect the presidents and resolve electoral disputes recently led to a political crisis that almost led to a civil war.²⁴¹ A US-brokered power-sharing agreement between the two leading candidates, Ashraf Ghani and Abdullah Abdullah, resolved

239. See, e.g., Hamid Shalizi, *Afghan Leader Defies Parliament by Telling Sacked Ministers to Stay*, REUTERS (Nov. 14, 2016, 9:03 AM), <https://www.reuters.com/article/us-afghanistan-parliament/afghan-leader-defies-parliament-by-telling-sacked-ministers-to-stay-idUSKBN1391LC>; see also Ghani Seeks Constitutional Solutions as End of Parliament's Term Looms, TOLONews (June 11, 2015), <http://www.tolonews.com/afghanistan/ghani-seeks-constitutional-solutions-end-parliaments-term-looms>.

240. KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [INDEP. COMM'N FOR OVERSEEING THE IMPLEMENTATION OF THE CONSTITUTION] 1395 [2016], NAZARYA-YE HUQUQI KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI DAR RABITA BA DARKHWAST RAEES JAMHUR RAJI BA SARNAWISHTI FARMAN TAQNINI-YE SHOMARA 159 [LEGAL OP. OF THE INDEP. COMM'N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION REGARDING THE REQUEST OF THE PRESIDENT ON THE LEGAL STATUS OF PRESIDENTIAL DECREE NO. 159 ENACTING THE LAW ON THE ORGANIZATION, JURISDICTION AND DUTIES OF THE INDEPENDENT ELECTORAL COMMISSION AND ELECTORAL COMPLAINTS COMMISSION], OPINION NO. 5 (Afg.) [hereinafter LEGAL OP. OF THE INDEP. COMM'N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION REGARDING THE REQUEST OF THE PRESIDENT ON THE LEGAL STATUS OF PRESIDENTIAL DECREE NO. 159].

241. Shamsad Pasarlay, Mohammad Qadamshah, & Clark B. Lombardi, *Reforming the Afghan Electoral System: The Current Debate and Its Implications for the Plans to Amend the Afghan Constitution*, I-CONNECT (May 8, 2015), <http://www.iconnectblog.com/2015/05/reforming-the-afghan-electoral-system-the-current-debate-and-its-implications-for-the-plans-to-amend-the-afghan-constitution/>.

the immediate election crisis.²⁴² The National Unity Government Agreement (NUGA) between Ghani and Abdullah provided that Ghani would be recognized as president of Afghanistan and Abdullah would be recognized as its chief executive – a position not envisioned in the 2004 Constitution.²⁴³ The NUGA provided that the president would cooperate with the chief executive to appoint ministers and Court justices to set policies.²⁴⁴ Together, they would also appoint a commission to draft amendments to the 2004 Constitution; the president would then convene a *Loya Jirga*, Afghanistan's constitutional amendment convention,²⁴⁵ which is empowered under the Constitution to debate, approve, or modify constitutional amendments.²⁴⁶

Thus, one interesting question is whether the current fragmented system of constitutional interpretation and judicial review can survive the prospect of a significant set of constitutional amendments under the NUGA. Although there is broader political support for the creation of a separate constitutional court that would interpret the constitution and perform all types of constitutional review functions, political realities and the conduct of the National Unity Government thus far suggests that it is likely that the current system of judicial review will survive the prospect of a significant set of constitutional amendments in Afghanistan. Meanwhile, opting for a separate constitutional court seems challenging, as it requires extensive debates, compromise, and consensus.

More importantly, the National Unity Government completed its three-and-a-half years in February 2018, but it has yet to finalize plans to reform its electoral system and appoint a commission to draft amendments to the constitution.²⁴⁷ At the time of this writing, it appears

242. ALI JALALI, U.S. INST. OF PEACE, FORGING AFGHANISTAN'S NATIONAL UNITY GOVERNMENT 1 (2015), <http://www.usip.org/publications/forging-afghanistan-s-national-unity-government>.

243. *Id.*; see also *Agreement Between the Two Campaign Teams Regarding the Structure of the National Unity Government*, L.A. TIMES (Sept. 21, 2014), <http://documents.latimes.com/agreement-between-two-campaign-teams-regarding-structure-national-unity-government/>.

244. *Agreement Between the Two Campaign Teams Regarding the Structure of the National Unity Government*, *supra* note 243.

245. *Id.*

246. 2004 CONSTITUTION OF AFGHANISTAN, *supra* note 5, art. 150.

247. Mohammad Shafiq Hamdam, *Saving Afghanistan from the Edge of Failure*, PAJHWOK AFGHAN NEWS (Oct. 2, 2016), <https://www.pajhwok.com/en/opinions/saving->

unlikely that a constitutional amendment *Loya Jirga* will be convened to debate and adopt amendments to the constitution, thus creating a separate constitutional court with the power to interpret the constitution and review the constitutionality of legislation.

Finally, the National Unity Government seems to be following Karzai's trick – using the two institutions to accomplish different things. For instance, on the question of whether it would be constitutional for the parliament to continue after its term ended in June 2015 with no elections held, President Ghani referred to the Court, which issued a secret opinion.²⁴⁸ By contrast, President Ghani asked the Commission for legal advice when the parliament rejected an executive decree on reforming the Afghan electoral system.²⁴⁹ For all of these reasons, it seems that the current fragmented system of constitutional interpretation and judicial review might endure into the indefinite future.

V. LESSONS FROM THE FRAGMENTED SYSTEM OF CONSTITUTIONAL INTERPRETATION AND JUDICIAL REVIEW IN AFGHANISTAN

The drafters of the 2004 Constitution of Afghanistan, for the first time in Afghan history, equipped the Supreme Court to exercise judicial review, causing the drafters to expect that the Court will play a key role in safeguarding the constitution and interpreting its vague provisions.²⁵⁰ However, constitutional ambiguities surrounding judicial review and constitutional interpretation created serious obstacles for the Court to effectively exercise its powers as the guardian of the constitution.²⁵¹ The political branches of the government manipulated these constitutional ambiguities and vested two rival institutions with judicial review and

afghanistan-edge-failure. For more details on how electoral reforms under NUGA relates to the convention of the *Loya Jirga* to amend the Constitution, see *Constitutional Interpretation*, *supra* note 1.

248. See *Ghani Seeks Constitutional Solutions as End of Parliament's Term Looms*, TOLONews (June 11, 2015), <http://www.tolnews.com/afghanistan/ghani-seeks-constitutional-solutions-end-parliaments-term-looms>.

249. LEGAL OP. OF THE INDEP. COMM'N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION REGARDING THE REQUEST OF THE PRESIDENT ON THE LEGAL STATUS OF PRESIDENTIAL DECREE NO. 159, *supra* note 240.

250. *When Courts Decide Not to Decide*, *supra* note 106.

251. See JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE, *supra* note 203, at 1.

constitutional interpretation powers, which severely undermined the powers of both the Court and the Commission to issue binding opinions.²⁵²

The experience of Afghanistan with judicial review thus offers a very significant lesson for the drafters of constitutions. Specifically, by leaving the laws of constitutional review bodies vague and undecided, a dangerous situation is created. Constitutional ambiguities surrounding the powers of judicial review bodies, like constitutional courts, have the potential of undermining the powers of such institutions in the future. Such constitutional ambiguities may dangerously lead to the politicization of the relations between the legislature and the judiciary, thereby resulting in direct conflict between them, in which the institutional security and independence of the judiciary is at stake.²⁵³ Afghanistan's history of judicial review further indicates that downstream legislatures and executives might simply choose to strike at the independence and authority of apex courts using constitutional ambiguities that define the judiciary's powers and organization.²⁵⁴

Furthermore, the experience of Afghanistan with judicial review and constitutional interpretation shows the dangers of issuing advisory opinions. Issuing advisory opinions might potentially undermine the popular legitimacy and independence of apex courts. The Court and the Commission's large number of advisory opinions have led the legislature and the executive to treat both the Commission and the Court as bodies that are subordinates to the political branches of the government.²⁵⁵ The political branches of the government have treated every judicial review and constitutional interpretation opinion as advisory rather than as a binding decision.²⁵⁶ As a result, both the Commission and the Court have struggled to establish themselves as independent and co-equal branches of government.²⁵⁷

252. See *When Courts Decide Not to Decide*, *supra* note 106.

253. See *id.*

254. See *id.*

255. JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE, *supra* note 203, at 3.

256. See *Constitutional Interpretation*, *supra* note 1.

257. See *id.*; see also JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE, *supra* note 203, at 3.

Finally, the history explored in this Article should interest scholars who study the politics of courts in authoritarian regimes. This history adds a critical case study to the scholarship on the functions of courts in authoritarian governments. Tom Ginsburg and Tamir Moustafa argue that authoritarian rulers strike at the power of the judiciary by setting up fragmented judicial systems in place of unified judiciaries.²⁵⁸ They explain that “[i]n the ideal type of a unified judiciary, the regular court[s] . . . [have] jurisdiction over every legal dispute”²⁵⁹ However, in fragmented systems, one or more supplementary, and at times interim, courts tend to operate along the regular judiciary.²⁶⁰ In these special courts, “the executive retains tight controls through nontenured political appointments, heavily circumscribed due process rights, and retention of the ability to order retrials if it wishes.”²⁶¹ Politically sensitive and charged cases, about which the executive really cares, are channeled into these special temporary courts, allowing rulers to eliminate and marginalize political threats as necessary.²⁶² The existence of such auxiliary courts alongside the regular judiciary in turn undermines the regular judiciary’s powers to resolve all judicial cases.

The example of the fragmented system of judicial review in Afghanistan illustrates how Ginsburg and Moustafa’s theory may extend to powerful, not necessarily authoritarian, executives who may also contain the power of the regular judiciary by deliberately setting up competing institutions to resolve constitutional disputes. In Afghanistan, we saw that setting up the Commission, whose power overlapped with the Court, limited the power of the Court to unilaterally perform judicial review and issue binding constitutional interpretation opinions. The structure has threatened to strip the Court of its constitutional interpretation power. Furthermore, the main reason why Karzai’s government settled on this practice seems to be that this structure increased the likelihood that at least one of the two institutions would

258. Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 17 (Tom Ginsburg & Tamir Moustafa eds., 2008).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

side with the regime, thus further diminishing the ability of courts to effectively serve as checks on the actions of the executive.

VI. CONCLUSION

Inspired by the successful experience of judicial review in emerging democracies, the makers of the 2004 Constitution of Afghanistan, for the first time in Afghan history, adopted judicial review.²⁶³ The makers of the 2004 Constitution anticipated that armed with the power of judicial review, the Court would play a crucial role in safeguarding the Constitution.²⁶⁴ However, Afghanistan's judicial review experience thus far has not been a successful story, primarily because of the constitutional ambiguities surrounding the jurisdiction and organization of the Court. The political branches of the government took advantage of these constitutional ambiguities and adopted legislation that vested the power of judicial review and constitutional interpretation in two rival institutions.²⁶⁵ As a result, somehow unusual by comparative standards, there is no unified hierarchical judiciary empowered to interpret the constitution, review the constitutionality of legislation, and resolve other disputes that emerge from the implementation of law between the legislature and the executive.²⁶⁶

One of the key – and negative – implications of this fragmented system of judicial review in Afghanistan is that it has limited the power of the regular judiciary to unilaterally exercise judicial review functions and interpret the constitution. Moreover, setting up competing institutions to resolve constitutional disputes has undermined the authority of both the Court and the Commission to issue binding judicial reviews and constitutional interpretation opinions. Instead, Afghanistan's fragmented system of judicial review has allowed the executive to submit simultaneous requests to both the Court and the Commission in the hopes that at least one institution will offer a more favorable opinion.²⁶⁷

The dual institutional mechanism to interpret the constitution and review the constitutionality of legislation in Afghanistan thus highlights

263. *When Courts Decide Not to Decide*, *supra* note 106.

264. *Id.*

265. See discussion *supra* Section IV.

266. *Constitutional Interpretation*, *supra* note 1.

267. WORDEN & SINHA, *supra* note 91, at 3.

deep flaws relating to judicial review – flaws that generate costly political crises every time a dispute emerges between the legislature and the executive over election results or appointment and removal of senior government officials. “Having two legal institutions with overlapping mandates in a highly politicized environment is a recipe for instability and fundamentally undermines the rule of law.”²⁶⁸ As a result of this fractured institutional mechanism, the Court has avoided ruling on key constitutional disputes.²⁶⁹ In fact, many constitutional disputes between the legislature and the executive were ultimately resolved through politics rather than judicial intervention – a practice that has severely undermined the ability of the judiciary to function as an effective check on the political branches of the government and safeguard the constitution.

The key lesson to draw from the fragmented system of judicial review in Afghanistan is that having two parallel institutions with overlapping powers to interpret the constitution and review the constitutionality of legislation undermines the powers of the regular judiciary. To avoid constitutional crises of the type seen in Afghanistan, it is important that constitution makers develop, adopt, and design within the constitution a unified judicial hierarchy to interpret the constitution and review the constitutionality of legislation. Otherwise, the independence and the institutional security of the regular judiciary might very well be at stake.

268. *Id.*

269. *When Courts Decide Not to Decide*, *supra* note 106.

VII. APPENDIX I: TRANSLATION OF THE OPINION OF THE SUPREME COURT ON THE CONSTITUTIONALITY OF THE LAW OF THE INDEPENDENT COMMISSION FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION

The High Council of the Supreme Court has passed the following opinion about the authorization of the Independent Commission for the Supervision of the Implementation of the Constitution [the Commission] to interpret the Constitution.

Article 8(1) of the Commission's law, which declares the interpretation of the Constitution part of the Commission's duty and authority, is, based on the following reasons, contrary to the explicit provisions of Article 121 of the Constitution.

1. The Drafting History of Article 121, and the Intent of the Constitutional Framers.

Before discussing other reasons, understating the gradual drafting history of Article 121 will be studied in the different drafts of the Constitution. Article 121 did not originally exist in the Constitution because there was another chapter on a Supreme Constitutional Court in the draft constitution. Article 146 of draft constitution read as follows:

Draft Article 146: The Supreme Constitutional Court of Afghanistan shall have the following authorities: (1) review laws, decrees, and international conventions for their conformity with the constitution and (2) interpret the constitution, laws, and legislative decrees.

Draft Article 146 explicitly shows that the intent of the framers was not only the interpretation of the Constitution, but also compliance of the laws and decrees with the Constitution and the interpretation of these laws and decrees. In this period of drafting, the constitutional review stage, as stated above, Article 121, which is now included in the Judicial Chapter of the Constitution, did not exist in the Chapter on Judiciary. Nonetheless, the Chapter on Constitutional Court was removed from the draft of the Constitution. After the Chapter on the Constitutional Court was removed, all authorities codified in Articles 146, 147, and 148 were

included in just one article, which became Article 121 in subsequent drafts of the constitution. Draft Article 121 read as the following:

Article 121: The Supreme Court upon the request of the government or courts shall review compliance with the constitution of laws, legislative decrees, international treaties, and international conventions. The Supreme Court has the authority to interpret the constitution, laws, and decrees.

As is evident in this language, draft Article 121 encompasses all of the provisions previously integrated into articles 146 and 147. Accordingly, the authority to interpret the constitution, laws, and other decrees has been given to the Supreme Court. Furthermore, it has also been pointed out that, as the constitution needs to be interpreted, other laws and decrees also need interpretation.

In another subsequent draft of the constitution, the *Loya Jirga* amended draft Article 121 as the following:

Article 121: The Supreme Court upon request of the government or courts shall review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law.

As we see in the wording of Article 121, repetition of similar words has been avoided, and by the usage of the object “them” not only the previous points about the necessity to interpret the constitution, laws, and other decrees has been emphasized but also the interpretation of international treaties and conventions has been signaled as essential. The usage of the phrase “interpret them” incorporates all that were integrated in the preceding draft Article 121 including the Constitution, laws, decrees, international treaties, and international conventions. Accordingly, it has been clarified that international treaties and conventions also need to be interpreted the same way as laws, decrees, and the Constitution needs interpretation. Furthermore, this wording of Article 121 takes place at the time when there is no signs of Article 157, which stipulates provisions about the Commission.

Nonetheless, in the final discussions of the *Loya Jirga*, which took place behind the scenes, in a subsequent draft of the Constitution, the structure of the Commission was incorporated in Article 157 of the Constitution. However, the inclusion of Article 157 in the Constitution

did not affect Article 121. Indeed, Article 121 was maintained with the same force. The language of Article 157 reads, “The Independent Commission for the Supervision of the Constitution will be established by law.” This language clearly states that Article 157 does not bestow any authority in terms of empowering the Commission to interpret the Constitution, or international treaties and conventions because no such authorization has been included in the text of Article 157. As a result, the authority to interpret the Constitution, similar to the interpretation of other laws, decrees, and international treaties, has been effectively assigned to the Supreme Court.

Moreover, there are other practical explanations that suggest that the Supreme Court is the only institution to interpret the Constitution: (1) the interpretation of the Constitution, other laws, and decrees requires the issuance of a judicial opinion, a “*Qarar-e-Qazhai*.” The issuance of a judicial opinion, having a binding character, is the sole authority of a court not of any other non-judicial organ, in this case the Commission; (2) the duties of the Commission are clear as it is the “Independent Commission for the Supervision of the Implementation of the Constitution”; meaning that the Commission is only mandated to oversee the implementation of the Constitution not to interpret the Constitution.” Any change in the text of Article 121 is outside the authority of many organs, and any amendment to this Article is only lawful when it is adopted by the *Loya Jirga*.

For these reasons, the Supreme Court passed its opinion (*Qarar*) rejecting the authority of the Commission to interpret the Constitution, explaining that constitutional interpretation is the exclusive authority of the Supreme Court by virtue of Article 121 of the Constitution. Accordingly, the Court holds that Article 8(1) of the Commission’s law is in contradiction with the Constitution.¹ (Translation ended).

1. Article 8(1) of the Law of the Independent Commission states, “the Commission should interpret the Constitution on the request of the government, the Supreme Court, the President, and the National Assembly.” QANUN-I KAMISON-I MOSTAQIL-I NIZARAT BAR TATBIQ-I QANUN ASSASI [LAW OF THE INDEP. COMM’N FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION] 1388 (2009), art. 8(1) (Afg.).

VIII. APPENDIX II: TRANSLATION OF THE SUPREME COURT'S OPINION
OF THE CONSTITUTIONALITY OF THE LAW OF THE DIPLOMATIC AND
CONSULAR STAFF OF AFGHANISTAN

In a letter to the Supreme Court, the Ministry of Foreign Affairs stated that Article 5(1) and Article 8 of the law of Diplomatic and Consular Staff (requiring that ambassadors and consular staff should have only Afghan nationality) are unconstitutional.² The Ministry argued that in the case of the application of the law, 25 ambassadors and 50 other personnel around the world, and in the second round, 50 highly experienced and educated central personnel, would lose their jobs. The Ministry argued that the application of this law violates the fundamental rights of the personnel of the Ministry. Therefore, the Ministry referred this issue to the Supreme Court and asked its opinion about the compliance of Article 5(1) and Article 8 of the Law with the Constitution.

The Supreme Court considered the constitutionality of Article 5(1) and Article 8 of the law of the Diplomatic and Consular Staff and decided the following:

The Constitution of Islamic Republic of Afghanistan articulates basic principles and general rules. Understanding and realizing the intent of the framers consists of an important part of these rules and principles because words, requirements, and conditions stipulated in the text of the law have special meaning. Understanding the meaning of such words requires us to refer to the intent of the framers. Any addition or subtraction to the requirements and condition that are mentioned in the Constitution are invalid and do not have any legal force.

There are clear provisions in the Constitution about the requirement of single nationality and that which governmental officials should have only one nationality (the nationality of Afghanistan). We consider these issues in turn.

2. Article 5(1) of the Law of Consular Staff says that all consular and diplomatic staff of the Ministry of Foreign Affairs must have only Afghan Nationality. DECISION NO. 20 OF THE HIGH COUNCIL OF THE SUPREME COURT ON THE UNCONSTITUTIONALITY OF ARTICLES 5(1) & 8 OF THE LAW OF DIPLOMATIC & CONSULAR STAFF OF AFGHANISTAN, OFFICIAL GAZETTE NO. 1114 (2014). Article 8 says that with the adoption of this law, all staff and personnel of who have second and third nationality should be fired. *Id.* art. 8.

First, the Constitution makes the single nationality requirement mandatory only for the president and the vice-presidents. Article 62 of the Constitution states that the individual who becomes a presidential candidate shall have the following qualifications: (1) shall be a citizen of Afghanistan, (2) shall be Muslim, born of Afghan parents, and (3) shall not have other nationalities. The provisions of this Article apply to the vice-presidents too. As is clear, this Article makes it mandatory for the president and the vice-presidents to have only one nationality and a person who has a second nationality or is born of non-Afghan parents cannot be nominated as president. Therefore, the requirement of singly nationality is only obligatory on the president and the vice-presidents and cannot be applied to other officials of the state.

Second, the optionality of second nationality for the ministers, and the empowerment of the *Wolesi Jirga* (lower house of parliament) to either reject or accept a candidate with dual nationality indicate that dual nationality is not mandatory on the ministers. In this regard, Article 72 states that the individual who is appointed as a minister shall have the following qualifications: shall have only the nationality of Afghanistan; if the ministerial candidate has the nationality of another country as well, the *Wolesi Jirga* shall have the right to approve or reject the nomination. In this Article, the legislature has not required that ministerial candidate must have single nationality, but it has empowered the *Wolesi Jirga* to either accept or reject nominations with dual nationality. This means that the president can appoint a person with dual nationality as minister, but it is subject to the consent of the *Wolesi Jirga*.

Except in these two special circumstances, there is no indication in the Constitution that requires state officials, including diplomatic and consular staff, to have only one nationality. If we look at the Constitution, it becomes apparent that there are no requirements for high-ranking state officials, who have higher governmental positions than ambassadors and diplomats, to have only one nationality. Therefore, it means that all these high-ranking state officials, except the president, vice-presidents, and cabinet ministers, can carry on their duties even if they have two or three nationalities.

We conclude from this analysis that adding the requirement of single nationality in Article 5(1) and Article 8 of the law of the Diplomatic and Consular Staff is in clear contradiction with the provisions of the Constitution. Therefore, in accordance with Article 121 of the Constitution, the High Council of Supreme Court decides on the

invalidity of Article 5(1) and Article 8 of the law of Diplomatic and Consular Staff. The Supreme Court accordingly informs the authorities of the Ministry of Foreign Affairs.